

# Time to Counter “Vaccine Nationalism”?

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2021-03-26T09:00:30

To this date, states with access to vaccines against the new coronavirus are focusing exclusively on inoculating people under their jurisdiction. This process has been accurately described as [“vaccine nationalism”](#). So far, a legal basis for an explicit human right to the distribution of vaccines is not codified in any treaty. However, the right to health and the right to enjoy the benefits of scientific progress and its applications are well established in international law. As such, they play a key role in the context of developing “new” human rights – particularly through their interconnectedness. In the present article, I will explore to what extent these two rights can work towards establishing a “new” human right to the distribution of vaccines.

## Access to Vaccines as an Integral Part of the Right to Health?

The right to health is codified, *inter alia*, in Art. 12 of the [International Covenant on Economic, Social and Cultural Rights](#) (ICESCR). Among other obligations, this provision requires the ICESCR’s [171 state parties](#) to [respect, protect and fulfil](#) the right to health by implementing health policies. The “right to health” is a misleading expression, since Art. 12 ICESCR does not include a right to “be healthy”. Rather, it obliges state parties to take all necessary steps towards guaranteeing the “enjoyment of the highest attainable standard of physical and mental health”.

Art. 12 ICESCR does not expressly mention the distribution of vaccines or the distribution and access of medical resources. Yet, it does refer to “the prevention, treatment and control of epidemic [...] diseases” (Art. 12(2) lit. c ICESCR). In order to better understand its precise meaning, the General Comments (GCs) and statements of the Committee on Economic, Social and Cultural Rights (Committee) can be used as a means of interpretation. While not legally binding, they provide important guidance as authoritative interpretations of the ICESCR. In [GC No. 14](#) on the right to health, the Committee recognised the need to include new determinants of health in the interpretation of Art. 12 ICESCR, such as the distribution of resources and formerly unknown diseases (para. 10). In 2020, [GC No. 25](#) provided further guidance by linking the right to health with the right to enjoy the benefits of scientific progress (Art. 15(1) lit. b ICESCR). According to GC No. 25 para. 67, this right incorporates the duty of states to establish new medical applications. In the same paragraph, the Committee also explicitly stated that the availability and distribution of vaccines as essential medical products to combat diseases is covered by its interpretation of the right to health. Recently, this interpretation was reaffirmed by the Committee in its [“Statement on universal affordable vaccination for COVID-19, international cooperation and intellectual property”](#) (Statement) on 12th March 2021.

## Counterbalancing International Cooperation and Domestic Preference

Since this new reading by the Committee covers the distribution of vaccines, one might ask whether states are only obliged to fulfil this right towards people under their jurisdiction, or *vis-à-vis* other state parties of the ICESCR. In general, there is no jurisdiction clause which limits the obligations of the ICESCR to people under a state's jurisdiction. According to the [doctrinal consensus](#) and the Committee, the states parties' "obligation to fulfil" the right to health relates firstly to national measures. Examples of such national measures include the implementation of national health policies, programmes to fight infectious diseases, and the just distribution of medical resources within the respective state (GC No. 14 para. 36). This resembles with Art. 15(1) lit. b ICESCR, since its core obligation relates to national frameworks and action plans (GC No. 25 para. 52). Consequently, the act of prioritising people under its jurisdiction is not only common in law but corresponds to well-established the reading of international human rights obligations (see e.g. [here](#) and [here](#)).

At the same time, states must also consider their obligations towards the international community. Indeed, the right to health and the right to enjoy the benefits of scientific progress both comprise an obligation of international assistance and cooperation. International cooperation is an obligation that can be derived from various legal sources, such as Art. 15(4) and Art. 2(1) ICESCR as well as Art. 1(3) of the [UN Charter](#) (UNCh). The duty to cooperate does not only refer to the action between states; it also obliges them to cooperate with organs of the UN. Cooperation in the field of health is especially highlighted by Art. 56 and Art. 55(1) lit. b UNCh and the non-binding [Alma-Ata Declaration](#) on primary health care of 1978. The latter aims to even out the large differences between the overall [health status](#) in the Global North and South by urging states to cooperate. However, it can be criticised of being overly broad and infeasible. Nevertheless, as stated by the Committee, international cooperation is especially needed because of the existing [inequality](#) between states (GC No. 25 para. 79, Statement para. 2). The Committee also highlighted the special cooperation duty during a pandemic between states and towards the [WHO](#), referring specifically to the need to share knowledge about vaccines (GC No. 25 para. 82). According to the legally non-binding [Maastricht Principles on Extraterritorial Obligations](#) of 2011, which are principles concerning the economic, social and cultural human rights, the states' duty to cooperate also covers technical and financial assistance (para. 33) aimed at realising human rights universally (para. 8). Such a broad obligation remains highly controversial. Nonetheless, one could consider applying the no-harm principle (discussed [here](#)) in this context, prohibiting states to harm one another by stock-piling vaccines. Accordingly, a violation of the no-harm principle by a state would already occur if the number of vaccines exceeded the amount needed for protecting its population.

GC No. 14 para. 39 mentions three prerequisites for a state's obligation to facilitate access, hence distribute resources to other states: The help must be **necessary**, the provision of resources must be **possible**, and the resources concerned must be **available**. Without doubt, the distribution of vaccines is necessary to those states that are not able to establish a vaccination regime. However, both the provision and

the availability are questionable during the COVID-19 pandemic. The provision of vaccines requires an effective medical infrastructure such as adequate refrigeration facilities. Further, their availability is an obstacle too, since to this date, there is a severe scarcity of vaccines. One could argue that the two conditions (possibility and availability) have not been met as required by the Committee, which itself envisages problems in this regard (Statement paras. 1, 10). But does that mean that no such obligation applies at all?

According to GC No. 25 para. 70, states are obliged to make their best scientific progress accessible to everyone to enjoy the highest realisable standard of health. To this end, states must use the maximum of their available resources (Art. 2(1) ICESCR). This primarily addresses the Global North due to its economically advanced position. According to the Committee, they have a special responsibility to help during a health crisis even if the prerequisites mentioned above are not fulfilled. The Committee even argues that states would otherwise violate their extraterritorial obligations (Statement para. 4). If the provision of vaccines towards states in the Global South is not feasible, financial support to individual states will have considerable effect (GC No. 25 para. 67, GC No. 14 para. 40, Statement para. 6). It could either be directed towards individual states or initiatives such as “[COVID-19 Vaccines Global Access](#)” (COVAX). Another way to make vaccines more available for all is by sharing their “[recipe](#)”. However, this raises additional questions concerning intellectual property rights in the field of health (discussed in Statement paras. 7-13 and [here](#)). The Committee calls for a supportive function of intellectual property rights in the context of the access to medical resources, especially towards states of the Global South (GC No. 25 paras. 69, 83). Even further, it argues that states must prevent intellectual property rights, as a “social product”, from being detrimental to economic, social and cultural human rights (Statement para. 7). In total, there are many [ideas](#) on how states could address such a distribution.

## **The Emerging Human Right to the Distribution of Vaccines**

The distribution of vaccines is crucial to fight the coronavirus and its mutations. So far, states have refused to accept a positive extraterritorial obligation in the context of the right to health and the right to enjoy the benefits of scientific progress and its applications. While it is lawful and reasonable to concentrate on the vaccination of people under a state’s jurisdiction first, the international community must face the reality that the COVID-19 pandemic can only be overcome if the [majority of the world’s population](#) has been vaccinated. If states want to prevent the global spread of the coronavirus and in particular the development of its mutations, the new and combined reading of Art. 12(2) lit. c and Art. 15(1) lit. b ICESCR by the Committee can guide states in light of the prerequisites discussed above: necessity, possibility, and availability. Tackling the COVID-19 pandemic definitely demands the best efforts of all states – especially of the Global North. The aim must be to counteract the widening inequality between states, particularly in light of the obligation to cooperate. While there is no explicit legal basis for a human right to the distribution of vaccines quite yet, the COVID-19 pandemic could well serve as a catalyst for defining the emerging human right to the distribution of vaccines.

